Supreme Court, U.S.
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No.

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1993

ANTONIO CAMACHO,

Petitioner

vs.

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the
Unites States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

DOES THE TERM
"LAWFUL UNRELINQUISHED DOMICILE"
IN 8 U.S.C. § 1182 [c]
INCLUDE ALL PERIODS OF LAWFUL
DOMICILE BY AN ALIEN,
AS DETERMINED BY THE SECOND CIRCUIT
IN *LOK v. I.N.S., SUPRA*,
OR ONLY PERIODS AFTER ADMISSION
TO PERMANENT RESIDENT STATUS ?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

No._____

Antonio Camacho, Petitioner
vs.
The Immigration and Naturalization Service, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Antonio Camacho, M.D. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, filed

on February 2, 1994, is unreported [Pet. App. A].[1] The decision of the Board of Immigration Appeals [Pet. App. B] from which the Petitioner appealed to the Ninth Circuit is unreported.

PARTIES

The names of all parties appear in the caption of the case.

JURISDICTION

The opinion of the Ninth Circuit was entered on February 3, 1994. No party petitioned for a rehearing in this case. Jurisdiction of this Court is invoked based upon the provisions of 28 U.S.C. § 1254[1].

APPLICABLE STATUTORY PROVISIONS

In this case, the issue upon which the Petitioner seeks review is the interpretation of 8 U.S.C. § 1182 [c] :

> Aliens lawfully admitted for permanent residence who temporarily

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[1] "Pet. App." refers to the appendix to this Petition.

> proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General ... .

STATEMENT OF BACKGROUND

The factual background of this case is best illustrated by a chronology of the events of the Petitioner's life:

March 9, 1939 - Petitioner was born in the Commonwealth of the Philippines.

October 17, 1960 - Petitioner married Beverly Runez in the Republic of the Philippines.

July 2, 1970 - Petitioner legally entered the United States as an exchange student [Status: J-1]. Since his legal entry into the United States on that date, the Petitioner has never departed. At the time of his entry, the Petitioner had four sons: Alberto, Antonio, Andrew, and Hector.

1970-The Petitioner received his Certificate of Registration as a Physician and Surgeon from the Illinois Department of Professional Regulation.

January 1, 1974 - Prior to this date, the Petitioner applied to become a permanent resident of the United States.

September 20, 1977 - The Petitioner and his wife become the parents of a daughter, Kim Margareth, a United States citizen by virtue of her birth in Chicago, Illinois.

June 1, 1982 - The Petitioner's status was adjusted to that of permanent resident.

September 11, 1984 - The Petitioner, a practicing physician, was convicted of unlawfully dispensing a restricted drug, Dilaudid[2], by the Cook County

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[2] The Petitioner was convicted on his guilty plea. He was sentenced to thirty months probation and a fine of $10,000.00. Except for this proceeding, the Petitioner has never been charged with or convicted of any other criminal

Court.

November 28, 1984-The Respondent issued an Order to Show Cause regarding the Petitioner's deportability as a result of his Cook County conviction.

February 1, 1985 - Petitioner first appeared before the immigration judge. The hearing was continued until June 27, 1985, then was again continued until January 13, 1986.

September 25, 1985 -The Director of the Department of Professional Regulation revoked the Petitioner's Certificate of Registration for a minimum of one year.

May 12, 1986-The hearing convened. Petitioner's Chicago immigration counsel[3] at that time asserted the Fifth

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offense.

[3] This identification is used to distinguish Petitioner's first immigration lawyer from California counsel who he retained in 1992 because many of the problems in this case stem from

Amendment in response to certain questions and requested a change of venue to California. During the hearing, Petitioner's counsel also sought a waiver of deportability [under 8 U.S.C. § 1182(c)] because Petitioner had been domiciled in the United States for over seven years. At the conclusion of the hearing, the IJ overruled the assertion of the Fifth Amendment, determined the Petitioner to be deportable, and denied the Petitioner a discretionary waiver of deportation.

May 22, 1986 - Petitioner's Chicago counsel filed an appeal to the Board of Immigration Appeals.

October 14, 1988-Petitioner's Chicago counsel filed a request for an extension until January 6, 1989 to file

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the actions, or inaction, of Petitioner's Chicago counsel.

an appellate brief. However, Petitioner's Chicago counsel failed to file a brief.

January 10, 1989 -Petitioner's wife, Beverly Camacho, became a citizen of the United States as did Petitioner's sons, Alberto Augustine Camacho and Hector James Camacho.

March 28, 1989 - Petitioner's son Andrew Runez Camacho became a citizen of the United States.

June 19, 1990-Petitioner's son Antonio Valente Camacho became a citizen of the United States.

August 28, 1991-The Board affirmed the Immigration Judge's decision. In its decision, the Board refused to apply the rule enunciated in *Lok v. I.N.S..*, 548 F.2d 37, 40 [2d Cir. 1977]. Instead, it followed the agency's interpretation of the statutory

language in 8 U.S.C. § 1182(c) which had been followed in *Anwo v. I.N.S.*, 607 F.2d 435 [D.C. Cir. 1979]. In its decision, the Board noted that the Petitioner was now eligible for relief under 8 U.S.C. § 1182(c). However, Chicago counsel had not filed a motion for a remand of the case. The Board made no finding, determination, or reference that the Petitioner's arguments on appeal were frivolous or meritless.

October 23, 1991-The Board issued a Warrant of Deportation. The Petitioner's surrender date was set for November 5, 1991.

November 4, 1991-Petitioner's Chicago counsel filed a motion to reopen on the ground that he was now eligible for a discretionary waiver under 8 U.S.C. § 1182(c) because he had

accumulated seven years of residence from his admission to permanent resident status.

January 10, 1992[4] -Petitioner's new counsel ["California counsel"] appeared and filed an amended motion to reopen which alleged ineffective assistance of counsel by Chicago counsel.

May 29, 1992-The Board denied the motion to reopen on the ground that [1] accrual of the seven years under 8 U.S.C. § 1182(c) commences from the admission to lawful permanent resident status, [2] the previous appeal by Petitioner was filed for the purpose of delay, and [3] that Petitioner therefore was not eligible for relief because he had accumulated his seven years under 8 U.S.C. § 1182(c) by

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[4] After January 10, 1992, Petitioner was represented exclusively by his California counsel.

filing a meritless appeal. [Citing *I.N.S. v. Rios-Pineda* , 471 U.S. 444 (1985).]

August 17, 1992 - By petition, as amended on August 21, 1992, the Petitioner sought review of the original Board decision on his appeal and review of the denial of his motion to reopen.

1984-1992-The Petitioner engaged in substantial efforts to rehabilitate himself and to regain the respect of his family and his community, through counseling from a psychiatrist and a psychotherapist, professional medical education, and volunteer services donated to help the elderly.

September 8, 1992-Based upon live testimony and expert opinion, Patricia O'Brien, a Hearing Officer of the Illinois Department of Professional Regulation found that the Petitioner had complied with the previous order

of the Department in that he had demonstrated the steps which he had taken to "insure that [he was] rehabilitated." She also finds "credible" his testimony that he has recognized his offenses, their cause in his own character flaws, and that he would never commit these acts again.

November 10, 1992 - The Illinois Medical Disciplinary Board adopted the report of the Hearing Officer and incorporated that report as a Finding of Fact. The Board recommended the restoration of the Petitioner's license upon submission of proof that he had taken and passed the SPEX examination.

January 4, 1993-Petitioner filed his Opening Brief urging, among other arguments, that the Ninth Circuit should reconsider its decision in

Castillo-Felix v. I.N.S. , 601 F.2d 459 [1979].

January 7, 1993-The Director of the Illinois Department of Professional Regulation ordered that the Petitioner be awarded an active Certificate of Registration upon submission of proof of successful completion of the SPEX examination.

February 3, 1994-The Ninth Circuit issued a memorandum opinion denying the Petition for review. The opinion conceded that an attempt by Camacho to establish the *Lok* rule in the Seventh Circuit might have had some merit. [Pet. App. A., p. 12.] The opinion then seized upon the apparent unawareness of Petitioner's Chicago counsel of the "inter-circuit" variance in the interpretation of the domicile requirement of 8 U.S.C. § 1182(c) as

proof that the appeal was made for delay. [5]

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[5] The Ninth Circuit panel stated:

> That Camacho aggressively moved for a change of venue demonstrates his lack of awareness of any inter-circuit variance regarding section 212[c] eligibility or lack of interest in establishing new law in the Seventh Circuit.
>
> *Id* ., at p. 15.

In doing so, the panel failed to distinguish between the Petitioner and his former counsel, a significant omission for a court reviewing the denial of his motion to reopen made on the ground, among others, that he was denied effective assistance of counsel.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT
CERTIORARI TO
RESOLVE THE CONFLICT
REGARDING THE
INTERPRETATION OF THE TERM
"LAWFUL UNRELINQUISHED DOMICILE"
AS USED IN 8 U.S.C. § 1182 [c].

QUESTION PRESENTED:

DOES THE TERM
"LAWFUL UNRELINQUISHED DOMICILE"
IN 8 U.S.C. § 1182[c] INCLUDE ALL PERIODS
OF
LAWFUL DOMICILE BY AN ALIEN,
AS DETERMINED BY THE SECOND CIRCUIT
IN *LOK v. I.N.S.*, *SUPRA*,
OR ONLY PERIODS AFTER ADMISSION
TO PERMANENT RESIDENT STATUS?

I. The Conflict Among the Circuits And the Confusion Regarding The Interpretation of 8 U.S.C. § 1182 [c].

The issue of the interpretation of the language of 8 U.S.C. § 1182 [c] first arose in 1953. In that year, the first interpretation was made by

the Board in *Matter of S* , 5 I&N Dec. 116 [BIA 1953]. In that case, the Board interpreted the term "lawful unrelinquished domicile" as commencing on the date that an alien is admitted to lawful permanent resident status.

That Board's interpretation stood unchallenged for twenty-four years. In 1977, the Second Circuit was confronted with a case involving an alien who had lived in the United States for over fifteen years but who had only been a permanent resident for four years at the time of his deportation hearing. At the time of his hearing, Tim Lok had also been married to an American citizen for over seven years.

Judge Kaufman wrote the opinion of the unanimous panel of the Second Circuit. The court confirmed that the exclusion was intended to:

> "... provide the Attorney General the flexibility and discretion to permit worthy aliens to continue their relationships with family members in the United States despite a ground for exclusion. *Francis v. I.N.S.* ,532 F.2d

268, 272 [2d. Cir. 1976].

Id. , at 39.

The court further reasoned that the exemption under 8 U.S.C. §1182 [c] is based on the principle that:

> Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties.

Id. , at 39.

However, the Petitioner's case was not measured by the Second Circuit Rule. Rather, the Petitioner's case was measured by the rule in the Ninth Circuit, as established by the opinion in *Castillo-Felix v. I.N.S.* , 601 F.2d 459 [1979] [Takasugi dissenting].

In *Castillo-Felix v. I.N.S., supra,* the petitioner entered the United States illegally in 1963. In November, 1969, after his apprehension by the INS, he voluntarily departed. One day later, he returned illegally and remained until he was apprehended a second time in late 1970. Shortly before his second apprehension, he married his

common law wife [a lawful permanent resident], with whom he had lived for nearly seven years. Based on his marriage, the petitioner was extended lawful permannt resident status on April 7, 1972. In August, 195, the petitioner was convicted of violating 8 U.S.C. § 1324 [a][4], and sentenced to six years in federal prison. At the time of the decision by the Ninth Circuit, the petitioner and his wife had five children, all born in the United States.

In June,1977, the Immigration Judge denied the petitioner discretionary relief under 1182[c] because he had not been continuously domiciled for seven years. However, the IJ also stated that, if he reached the merits of the petition, he would deny the petition on its merits as well.

In the majority opinion in *Castillo-Felix v. I.N.S., supra* , the research and reasoning of Judge Kaufman's opinion were rejected in favor of the INS' interpretation of § 1182 [c].

Thus, the court reasoned that, although

Congress *plainly* said:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, *and* who are returning to a lawful *unrelinquished domicile* of seven consecutive years, may be admitted in the discretion of the Attorney General ...;
>
> 8 U.S.C. § 1182 [c].
> [Emphasis added.]

what Congress really "meant" to say was that *only* :

> Aliens lawfully admitted for permanent residence ..., ...and who have been so lawfully admitted *as permanent residents* for seven consecutive years, may be admitted in the discretion of the Attorney General ...

This Court is urged to accept certiorari in the instant case to resolve the conflict between the circuits[6] and to clarify the statutory meaning of 8

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[6] The other circuits have followed *Castillo-Felix, supra* : *See Chiravacharadhikul v. I.N.S.*, 645 F.2d 248, 250 [4th Cir. 1980], *cert. den.* , 454 U.S. 893 [1981]; *Michelson v. I.N.S.*, 897 F.2d 465, 468-469 [10th Cir. 1990]; *Madrid-Tavarez v. I.N.S..*, 999 F.2d 111, 112 [5th Cir. 1993]. The Seventh Circuit announced that the parties in one case

U.S.C. § 1182[c] on this critical issue.

II. The *Castillo-Felix/Matter of S* Rule Clearly Frustrates the Congressional Intention in Enacting 8 U.S.C. §1182 [c] To Allow Discretion for Leniency Where, As Here, Legitimately Formed, Long-Standing Familial Relationships are Threatened by Deportation

Castillo-Felix, supra, personifies the time worn expression that "bad facts make bad law."

Mr. Castillo-Felix repeatedly entered the United States illegally. Then, after living illegally in the United States for nearly seven years, he married his common law wife and was accorded the grace of being admitted to lawful resident status. *Id.*, at 461. His disdain toward the generosity of our country was amply shown when he promptly began smuggling illegal aliens into the United States and counterfeiting "green cards." *Id.*, at 461 and fn. 2. His spouse[7] was also involved in

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"agreed" to the *Castillo-Felix* rule: *See Variamparambil v. I.N.S..*, 831 F.2d 1362, 1365-1366 [7th Cir. 1987] .

[7] The reader may detect the suspicion of the panel which seems to be implied in footnote one of the opinion:

> 1. Petitioner's spouse was admitted for

the ring. *Id.*, at fn. 2. It is little wonder that the Ninth Circuit was impatient with the claims of Mr. Castillo-Felix that his uninterrupted course of illegal actions over a ten year period were about to separate him from his five children conceived during his illegal tenure in the United States.

The differences between the Camacho case and that of Mr. Castillo-Felix define the difficulty with the *Castillo-Feliz/Matter of S* interpretation of Section 1182[c].

From the outset, the Petitioner admits that he committed a serious offense. Except for his offense, the applicability of 8 U.S.C. § 1182 [c] would never arise.

Petitioner and his wife of thirty-three years were born and married in the Philippines, a country which has a special relationship with the United States dating back to the 19th century.[8]

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permanent residence following her marriage to a United States citizen in 1963. She divorced her first husband in 1964.

[8] Beverly Runez Camacho comes from a Philippine family which exemplifies this relationship. Her grandfather served in Philippine Scouts under Governor General Arthur MacArthur.

They *lawfully* entered and resided *continuously* in the United States for *fourteen* years before Dr. Camacho had his only involvement in any criminal activity. They have now *legally* resided in the United States for over twenty two years. Mrs. Camacho and their four sons have passed every level of scrutiny by our government and have become citizens. All of them are productive members of American society with deep, lifelong roots in their communities. Their sixteen year-old daughter has lived her entire life in the United States. Deportation for Dr. Camacho does not mean moving to a bordering country, less than ten miles from his wife and children, as it did for Mr. Castillo-Felix. Deportation means permanent expulsion to a country over 8,000 miles away. Not only does Dr. Camacho have to leave but Alberto, Hector, Andrew, and Antonio must chose between

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Beverly's uncle, Arturo, served under General Douglas MacArthur, as an army physician treating Philippine and American soldiers on the Bataan peninsula. After he was captured, Arturo Runez survived the Bataan Death March.

living in America with families and friends, and their father. Kim must choose between the country of her birth and permanent separation from her father.

For Beverly Camacho, the choice parallels the choice posed in *Sophie's Choice* .[9] Is it any wonder that Judge Kaufman felt:

> Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties.

Lok v. I.N.S., supra,, at 39.

What reader would not seriously consider trading prison or brutal physical punishment against such a choice?

The facts of this case strongly demonstrate the reasons that Congress intended[10] "lawful

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[9] In *Sophie's Choice* , the heroine is forced to decide, in a Nazi death camp, which of her two children will live. Beverly Camacho faces the same Hobson's choice: selecting between her love for her children and grandchildren and her love for her husband.

[10] The argument need not rest only on factual analogy and discussion. Examination of the legislative history supports the Petitioner's interpretation of Section 1182[c]. *See: Lok, supra,* at p. 40.

unrelinquished domicile“ to mean something different than “admitted for permanent residence.” After all, the question is only: *does the Petitioner have a right to have his motion to reopen considered on its merits rather than dismissed summarily based on ineligibility?*

Perhaps, the simplest rule answers the question: plain words should not be tortured to reach a result forced by bad facts or an overabundance of deference to "agency interpretation." The discussions of Judge Kaufman in *Lok, supra,* and the dissent of Judge Takasugi in *Castillo-Felix, supra,* speak with a simplicity and an eloquence to which the author of this petition could only aspire.

In closing, *I.N.S. v. Rios-Pineda* , 471 U.S. 445 [1988] and *I.N.S. v. Doherty* , _ U.S. _ , 112 S.Ct. 718, 724 [1992], this Court has indicated its impatience with the need to confront immigration issues repeatedly in recent years. The Petitioner asks this Court to accept this case to establish a

"bright line" rule regarding Section 1182[c] [11]; to clear the existing conflict which allows aliens in the Second Circuit [12] benefits which are not allowed aliens in the Ninth Circuit; and to rectify the injustice of the Respondent's refusal to consider Dr. Camacho's motion for relief on its merits.

CONCLUSION

The words of Judge Takasugi summarizes it best:

> Finding that [Dr. Camacho] is eligible for relief does not of course entitle him to such relief. the Attorney general must exercise his discretion in order to circumvent the deportation

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[11] A comparison of this case and cases which reject *Lok* suggests that the Court might establish guidelines which recognize lawful residence with the intent of obtaining permanent domicile as included in the time for calculation of the seven years under Section 1182 [c]. For Dr. Camacho, that would allow the inclusion of the delay of more than eight years during which the Petitioner waited for the INS to grant his application for adjustment to permanent status.

[12] If the Petitioner had been seeking to manipulate the system, as the Ninth Circuit panel seemed to believe, he would have sought a change of venue to the Second Circuit rather than the Ninth.

> order. Accordingly, this case should be remanded to the BIA for further consideration.
>
> *Castillo-Felix, supra,* at 471.

The Petitioner here does not seek relief under Section 1182 [c] from this Court, he simply seeks the opportunity to present the equities of his case to the Attorney General. He prays that this Honorable Court will uphold his opportunity to do so.

April 29, 1994.

Respectfully submitted,

ORRIN LEIGH GROVER, III
Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO CAMACHO, Petitioner, v. U.S. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	NO. 92-70566 I&NS No. A18-927-764 MEMORANDUM*

On Petition For Review of An Order of
The Board of Immigration Appeals

Argued and Submitted January 12, 1994
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: ALDISERT,**WIGGINS and BRUNETTI, Circuit Judges.

Petitioner Antonio Camacho appeals the decision of the Board of Immigration Appeals dismissing his appeal and affirming the decision of the immigration judge finding him deportable based on his conviction of a controlled substance offense and denying his application for a discretionary waiver of deportability. Camacho also appeals the Board's denial of his motion to reopen his case on the ground that he had become eligible for such relief only by filing a meritless appeal.

I.

Camacho, a native of the Philippines who entered this county as an exchange visitor on July 7, 1970, obtained the status of an alien lawfully admitted to the United States for permanent residence on June 1, 1982. He was practicing medicine in the state of Illinois when he

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** Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

was convicted for unlawfully prescribing drugs on September 11, 1984. His license to practice medicine was revoked, and he was sentenced to thirty months probation and a $10,000 fine.

Deportation proceedings commenced on November 28, 1984 when the Immigration and Naturalization Service (INS) issued an Order to Show Cause against Camacho. The INS asserted that, because of his conviction, Camacho was deportable under Section 241 (a) (11) of the Immigration and Nationality Act (hereinafter "the Act"), 8 U.S.C. §1251 (a) (11) (1988).

Camacho first appeared before the immigration judge on February 1, 1985. After stating that he was not prepared to plead, Camacho was granted a continuance until June 27, 1985. He then requested, and was granted, a second continuance until January 13, 1986.

The hearing did not reconvene until May 12, 1986, at which time Camacho's counsel requested a change of venue to California "so that we might

more completely present the case in support of our contention that he is eligible for 212(c) relief." A.R. at 473. The judge declined to entertain the change of venue motion until the issue of Camacho's deportability was resolved.

At this hearing, the INS introduced a certified copy of an Illinois conviction for unlawful delivery of a controlled substance bearing the name "Antonio C. Camacho." The immigration judge instructed Camacho to provide his full name. On advice of his former counsel, Camacho refused to provide his middle initial on the ground that it might send the INS on a "fishing expedition" in violation of his Fifth Amendment right against self-incrimination. Id. at 499. Camacho was then ordered to provide his full name, whereupon he admitted that his middle initial was "C" and that the conviction related to his past unlawful activity. It was then determined that Camacho was deportable.

At the May 12, 1986 hearing, Camacho further argued that he was eligible for relief under

Section 212(c) of the Act, 8 U.S.C. § 1182(c), which provides for a discretionary waiver of deportability for eligible aliens. The immigration judge ruled Camacho ineligible this relief because he had been a lawful permanent resident only since 1982, a period less than the requisite seven years.

Camacho filed an appeal to the Board of Immigration Appeals on May 22, 1986. On October 14, 1988 he requested, and was granted, an extension until January 6, 1989 to file an appellate brief. No brief was filed. On August 28, 1991, the Board affirmed the immigration judge's decision and dismissed Camacho's appeal, holding that there was no violation of his Fifth Amendment rights, that he was deportable "by clear, unequivocal, and convincing evidence" and that he was ineligible for Section 212(c) relief because he had not attained seven consecutive years of lawful domicile after becoming a permanent resident. A.R. at 409-10. The Board rejected Camacho's argument that Section 212(c) relief should be

available to an alien who accrued seven years of unrelinquished domicile in the United States and was also a lawful permanent resident at the time of application, a view held by the Court of Appeals for the Second Circuit, Lok v. I.N.S., 548 F.2d 37, 40 (2d Cir. 1977), but rejected by every other court of appeals to address the issue, as well as by the Board itself through forty years of precedent. See Matter of Anwo, 16 I&N Dec. 293 (BIA 1977), aff'd sub nom., Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979). In Anwo, 607 F.2d at 436, the court noted:

> Since the incorporation of this provision in the Immigration and Nationality Act of 1952, the Board of Immigration Appeals has consistently interpreted the "lawful unrelinquished domicile" requirement to mean that the alien must have maintained a domicile in this county for seven consecutive years after his lawful admission for permanent residence.

Thus, one who has merely been present or lived in the United States for seven years without being

admitted as a permanent resident, such as an exchange student, does not qualify for Section 212(c) relief.

On October 23, 1991, after the Board dismissed Camacho's appeal, the INS issued a Warrant of Deportation. On November 4, 1991, one day before he was required to surrender for deportation, Camacho, through his former counsel, filed a motion to reopen and remand on the ground that he had become eligible for a discretionary waiver of deportability under Section 212(c).

On January 10, 1992, Camacho, through new counsel, filed an amended motion to reopen and stay of deportation on the ground that his former counsel provided ineffective assistance. On May 29, 1992, the Board denied Camacho's petition to reopen. It determined that, although Camacho had by that time acquired the requisite seven years of lawful permanent residency, he did so by virtue of an appeal from the immigration judge's decision that "lacked an arguable basis in law or fact, and

was filed for improper purpose, such as to cause unnecessary delay." A.R. at 5. Regarding the three contentions raised by Camacho in his earlier appeal, the Board stated:

> The respondent's contention in his original appeal that he should not have been forced to testify on the deportation issue had no merit because he only testified to his name and a conviction which occurred in 1984. The respondent's allegation that he was eligible for section 212(c) relief had been decided against him outside of the Second Circuit Court of Appeals. It follows that if deportability and the question of relief from deportation were settled issues, then the issue of the change of venue was rendered

Id. (citations omitted).

On August 17, 1992, Camacho petitioned for review of the Board's May 29, 1992 denial for his motion to reopen. On August 21, 1992 he submitted a second petition for review, fashioned as an "amended" petition, requesting us to review the Board's August 28, 1991 dismissal of his appeal

from the underlying order of deportation, as well the denial of his motion to reopen.

II.

In the petition for review now before us, Camacho contends that the Board erred (1) in dismissing his appeal and (2) in denying his petition to reopen on the ground that his Section 212(c) eligibility was obtained through a meritless appeal. Specifically, Camacho argues that his appeal should not have been dismissed because serious Fifth Amendment issues were implicated and because, at the time of the appeal to the Board, there was a reasonable basis for the legal argument that the Court of Appeals for the Seventh Circuit would adopt the reasoning of the Second Circuit in Lok as the proper measure for Section 212(c) eligibility. This leads to Camacho's second and more substantive contention that the Board erred in denying his motion to reopen because, even if the appeal was properly dismissed, it did not lack

merit, and because he has since become eligible for Section 212(c) relief.

We review the Board's decision to dismiss an appeal for abuse of discretion. Cuadras v. I.N.S., 910 F.2d 567, 572 (9th Cir. 1990). We review the Board's denial of a motion to reopen de novo where that denial is based on an error of law. Wall v. I.N.S., 722 F.2d 1442, 1444 (9th Cir. 1984). However, our review is for an abuse of discretion where the Board's decision not to reopen is based on a factual determination that an appeal lacked merit and was filed for an improper purpose. I.N.S. v. Rios-Pineda, 471 U.S. 444, 448-49 (1985).

We will deny the petition. We conclude that the Board neither abused its discretion in dismissing Camacho's appeal nor in denying his petition to reopen given the facts of this case.

III.

We first address Camacho's contention that the Board erred in dismissing his appeal.

A.

Camacho contends that his Fifth Amendment right against self-incrimination was violated because he was compelled to testify about his connection to a prior criminal conviction. Even though a deportation hearing is not a criminal proceeding, aliens in such hearings do enjoy a limited Fifth Amendment right to silence when answering might subject them to future criminal prosecution. Wall, 722 F.2d at 1443. However the right to silence does not attach where the inquiry regards a prior conviction. Id. Consequently, Camacho had no constitutional right to refuse to answer questions surrounding a prior conviction for which he had already been punished. Similarly, the Fifth Amendment privilege against self-incrimination does not include the right in a denaturalization case to refuse to answer questions regarding naturalization, including time and place of birth. United States v. Costello, 222 F.2d 656, 662 (2d Cir), cert. denied, 350 U.S. 847 (1955).

We believe that the name of a participant in an immigration proceeding is administrative information in the same vein as time and place of birth and that no Fifth Amendment right to silence attaches. In any case, Camacho's counsel advised him at the May 12, 1986 hearing not to provide his full name on the ground that it might send the Government "on a fishing expedition" that "eventually could very well lead to further actions against my client." A.R. at 499: We conclude that this bare statement is insufficient to demonstrate that such testimony might subject Camacho to future criminal persecution.

B.

Camacho further argues that the Board erred in dismissing his appeal on the ground that he was ineligible for Section 212(c) relief. Camacho entered the United States in 1970, but did not attain the status of permanent resident until 1982. With the lone exception of the Court of Appeals for the Second Circuit, all courts of appeals to consider the

issue have agreed that, for the purposes of Section 212(c) eligibility, the seven year period does not commence until the alien becomes a lawful permanent resident. See Castillo-Felix v. I.N.S., 601 F.2d 459, 467 (9th Cir 1979); Chiravacharadikul v. I.N.S., 645 F.2d 248, 250 (4th Cir.), cert. denied, 454 U.S. 893 (1981); Reid v. I.N.S., 756 F.2 7, 10 (3d Cir. 1990). Moreover, this has long been the position of the Board, as the Court of Appeals for the Fifth Circuit noted: "For the last forty years, the [Board] has interpreted this language as requiring that, to be statutorily eligible, the alien must have been a lawful permanent resident of the United States for at least seven years prior to his or her application for § 212(c) relief." Madrid-Tavarez v. I.N.S., 999 F.2d 111, 112 (5th Cir. 1993).

Camacho now argues that Section 212(c) eligibility should be available in the Seventh Circuit to any alien who has accrued seven years of lawful unrelinquished domicile and is also a lawful

permanent resident at the time of application for relief, the position embraced by the Court of Appeals for the Second Circuit in Lok, 548 F.2d at 40. The Board rejected Camacho's argument that he was eligible for relief, noting that "[w]e had previously declined to apply the decision in Lok v. I.N.S., 548 F.2d 37 (2d Cir. 1977) in cases arising outside the Second Circuit." A.R. at 411 (citing Matter of Anwo, 16 I&N Dec. 293). We are persuaded that in rejecting this contention, the Board acted well with appropriate bounds of discretion in light of the long history of Board precedent and the general consensus of reviewing courts, including our own 1979 determination in Castillo-Felix, 601 F.2d at 467.

IV.

We next address Camacho's contention that the Board erred in denying his motion to reopen.

A.

Camacho argues that, even if the Board properly dismissed his appeal on the merits, it

erred in later characterizing it as meritless in the denial of his motion to reopen. This is an important and distinct argument because, says Camacho, if his Section 212(c) claim was meritorious and not filed in order to qualify for Section 212(c) relief, then the Board may have abused its discretion in denying his petition to reopen now that he has attained seven years of permanent, lawful, unrelinquished domicile. Thus, we must examine the record as a whole and ascertain the Board's reasons for concluding that Camacho's appeal was filed for the improper purpose of attaining Section 212(c) eligibility.

B.

After reviewing the record in its entirety, we conclude that the Board did not abuse its discretion in denying petitioner's motion to reopen. The Attorney General has "broad discretion" to grant or deny a motion to reopen. I.N.S. v. Doherty, 112 S. Ct. 719, 724 (1992). Moreover, a party seeking to reopen bears a "heavy burden." I.N.S.

v. Abudu, 485 U.S. 94, 110 (1988). As the Supreme Court noted:

> Motions for reopening of immigration proceedings are disfavored . . . This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.

Doherty, 112 S. Ct. at 724-25 (citations omitted).

Three years earlier, the Court explained why it grants board discretion to the Board:

> No substance was found in any of the points raised on appeal, in and of themselves, and we agree with the [Board] that they were without merit. The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying the legal prerequisites. One illegally present in the Unites States who wishes to remain already has a substantial incentive to prolong litigation in order to delay

> physical deportation for as long as possible. The Attorney General can, in exercising his [or her] discretion, legitimately avoid creating further incentive for stalling by refusing to reopen suspension proceedings for those who become eligible for such suspension only because of the passage of time while there meritless appeals dragged on.

Rios-Pineda, 471 U.S. at 450.

Stripped to its essence, the petitioner's contentions on appeal to the Board were that (1) he lived in Illinois, a state which came within the jurisdiction of the Court of Appeals of the Seventh Circuit, and (2) although all the courts of appeals which had met the issue had ruled against the position he was maintaining except the Second Circuit in Lok, there remained the possibility that the Seventh Circuit would accept the Lok teachings so that a valid basis of appeal existed. But even the Court of Appeals for the Seventh Circuit, the court Camacho insists has been silent on the issue, has implicitly ruled in accordance with the majority of courts of appeals:

> To be eligible for discretionary relief from deportation under §212(c) an alien must (1) be "lawfully admitted for permanent residence" and (2) have "a lawful unrelinquished domicile of seven consecutive years." The first prong was admittedly satisfied in this case. The parties now also agree that the seven-year period of lawful domicile is to be measured from . . . . the date [the alien] was admitted to this country as a lawful resident.

Variamparambil v. I.N.S. , 831 F.2d 1362, 1365-66 (7th Cir. 1987). Significantly, this court referred to "lawful resident" as the beginning point of the seven year measurement, a status Camacho did not attain until 1982. Thus, under Variamparambil, Camacho was not eligible for Section 212(c) until 1989, years after the May 12, 1986 hearing. Although Variamparambli followed Camacho's one-page May 22, 1986 notice of appeal of the immigration judge's decision, it preceded his October 14, 1988 letter requesting an extension to file an appeal brief, a brief that was not forthcoming. Nevertheless, if there was nothing

more to this case, than Camacho's asserted attempt to establish the law of the Seventh Circuit through his appeal might have had some merit. But there is more.

The Board stated in its decision that Camacho's appeal "lacked an arguable basis in law or fact, and was filed for an improper purpose, such as to cause unnecessary delay." A.R. at 5. The Board later stated that Camacho's original appeal "had no points of merit. The only apparent purpose was to delay a final administrative order of deportation until after 7 years of lawful unrelinquished domicile subsequent to lawful permanent residence." Id. at 6. We must view the Board's determination that Camacho's appeal was filed for an improper purpose in light of the procedural history of this action.

Camacho had already requested, and was granted, numerous continuances. He filed many other motions, including a request for 60 additional days to submit an appeal brief that was never

forthcoming, as the Board noted in its decision. Id. An action commenced in 1984 has dragged on now for ten years, in part because of Camacho's litigation strategy.

In addition, Camacho's contention that he was attempting to establish the law of the Seventh Circuit was not fully articulated to the immigration judge or the Board at the time. As noted, he never filed a brief in support of his appeal. Rather, the Board concluded that he mentioned this argument in "bare allegations in the Notice of Appeal." Id. Although Camacho did raise his Lok argument at the May 12, 1986 hearing before the administrative hearing judge, he neither made reference to nor indicated any desire to establish the law of the Seventh Circuit. Indeed, the facts suggest that Camacho was unaware that the issue of Section 212(c) might be an open question in the Seventh Circuit.

What is most devastating to petitioner's present contention that he wished to make new law

in the Seventh Circuit is the fact that, as early as May 12, 1986 -- long before his appeal to the Board -- Camacho requested the immigration judge to transfer the proceedings to California because his home was now in that state and because he could better pursue his Section 212(c) claim there. Indeed in one sentence his counsel insisted that Camacho was eligible for Section 212(c) relief, theoretically because he believed the Seventh Circuit might accept the teachings of Lok, while in the next he argued for a change in venue to California. Id. at 466. Counsel for Camacho later stated: "I believe that Matter of Lok does in fact [govern]. I believe my client is eligible . . . for the reasons we've stated. And we would also pursue of course, our motion for Change of Venue . . . to seek such relief in the venue that's most convenient for him to produce witnesses, documentation, and evidence . . . ." Id. at 471. Finally, counsel for Camacho stated: "I would also ask that our motion for Change of Venue be

granted so that we might more completely present the case in support of our contention that he is eligible for 212(c) relief." Id. at 473.

It is not necessary to elaborate that California is not a state within the confines of the Seventh Judicial Circuit. Nor need we dwell on the fact that the Court of Appeals for the Ninth Circuit has long rejected the Lok measure for Section 212(c) eligibility. See Castillo-Felix, 601 F.2d at 467. That Camacho aggressively moved for a change of venue demonstrates his lack of awareness of any inter-circuit variance regarding Section 212(c) eligibility or a lack of interest in establishing new law in the Seventh Circuit. His continued desire to litigate this matter in California is evidenced by the filing of a habeas corpus petition in the Northern District of California in 1992.

Viewing the history of this case in its entirety, it was not unreasonable for the Board to conclude that the purpose of Camacho's decade-

long litigation, including numerous extensions and appeals, was to attain the requisite seven years or permanent residency. Accordingly, the Board's denial of Camacho's motion to reopen did not constitute an abuse of discretion.

We have considered all arguments presented by the petitioner. To the extent not discussed here, any other contentions have considered and rejected.

The petition for review is DENIED.

APPENDIX B

In re: ANTONIO CAMACHO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Carol A. King, Esquire
Marc Van Der Hout,
Esquire
3689 18th Street
SanFrancisco,
California 94110

ON BEHALF OF SERVICE: Seth B. Fitter
General Attorney

CHARGE: Order: Sec. 241 (a)(11), I&N Act [8 U.S.C. § 1251 (a)(11)] -
Convicted of controlled substance violation

APPLICATION:Reopening; reconsideration; stay of deportation

The respondent, through counsel, moves to reopen his deportation proceedings to have the Board remand the case to the immigration judge for a hearing on his application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). For the reasons discussed below, the motion will be denied.

The pertinent history of the case is as follows. The respondent, a native and citizen of the Philippines, is a married male alien. He entered the United States as an exchange alien in July of 1970. His status was adjusted to a lawful permanent resident on June 1, 1982. A conviction record showed that an "Antonio C. Camacho" was convicted in the Circuit Court of Cook County, Illinois, on September 11, 1984, of narcotics racketeering and delivery of a controlled substance. Under questioning at the hearing (over former counsel's objections) the respondent admitted that the conviction record related to him.

In a decision dated May 12, 1986, an immigration judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility and voluntary departure, denied his motion for a change of venue, and ordered him deported to the Philippines. The respondent appealed from that decision.

In a letter dated October 14, 1988, the respondent, through former counsel, asked for an additional 60 days to file an appeal brief.[1/] The Office of the Immigration Judge granted the respondent until January 5, 1989, to file an appeal brief. No appeal brief was ever filed.

1/ The respondent was represented at his deportation hearing on appeal and on the original motion to reopen by Jeffery A. Kriezelman, Esquire, of Chicago, Illinois.

In a decision dated August 28,1991, the Board dismissed the appeal. We found that deportability had been established by clear, unequivocal, and convincing evidence as required by 8 C.F.R. § 242.14 (a) and Woodby v. INS, 385 U.S. 276 (1966). We agreed with the immigration judge's decision that the respondent had been statutorily ineligible for relief from deportation under section 212(c) of the Act as of May 12, 1986. We noted that on June 1, 1989, during the pendency of the respondent's appeal at the Board, he acquired 7 consecutive years of lawful permanent domicile subsequent to admission as a lawful permanent resident. However, the respondent had not submitted a motion to remand to the Board to attempt to shoe outstanding equities which might indicate he would be worthy of a favorable exercise of discretion, so we declined to remand the case to the immigration judge to allow the respondent to apply for section 212(c) relief.

On November 4, 1991, the respondent, through former counsel, filed an amended motion to reopen and remand. In the motion the respondent states that he is now leigible for relief under section 212(c) of the Act. He submits numerous documents in support of his motion.

On January 10, 1992, the respondent, through present counsel, filed an amended motion to reopen and motion for reconsideration and stay of deportation. In the amended motion the respondent states that his case should be reopened due to the ineffective assistance of former counsel.

He also states that, in any event, the proceedings should be reopened because new material evidence has arisen since the initial hearing. In the alternative, the respondent asks the Board to reconsider its August 28, 1991, decision. Several documents are submitted in support of the amended motion.

The Supreme Court has recently revisited this Board's authority to deny a motion to reopen deportation proceedings. INS v. Doherty, 502 U.S. 112 S. Ct. 719, 724 (1992). First, the Supreme Court reemphasized that there is no statutory provision for the reopening of a deportation proceeding and noted that the authority for such motions is derived solely from regulations promulgated by the Attorney General. Id.; see also INS v. Rios-Pineda, 471 U.S. 444, 446 (1985). Further, the regulation pertaining to motions to reopen, 8 C.F.R. § 3.2, is couched soley in negative terms. INS v. Doherty, supra, at 724.[2/] As the Supreme Court stated, the pertinent regulation "requires that under certain circumstances a motion to reopen must be granted. INS v. Wang, 450 U.S. 139, 143 n.5 (1981) (per curiam). Moreover, the regulations "plainly disfavor" motions to reopen. INS v. Abudu, 485 U.S. 94, 110 (1988).

2/ The regulation provides in pertinent part as follows: "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . ." 8 C.F.R. § 3.2 (1991).

The Supreme Court has also noted that the granting of a motion to reopen is discretionary and that the Attorney General has "broad discretion" to grant or deny such motions. INS v. Doherty, supra, at 724; INS v. Riso-Pineda, supra, at 449; INS v. Phinpathya, 464 U.S. 183, 188 n.6 (1984); see also INS v. Wang, supra, 143 n.5. Further, a party seeking reopening bears a "heavy burden." INS v. Abudu, supra at 110. In this regard, the Court has stated: "motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain on the United States." INS v. Doherty, supra at 724-25 (footnote omitted); see also INS v. Abudu, supra at 170-08; INS v. Rios-Pineda, supra at 450.

The Supreme Court has held that there are "at least" three independent grounds on which this Board might deny a motion to reopen. INS v. Doherty, supra, at 725; INS v. Abudu, supra, 104-05. In the first instance, this Board may deny a motion to reopen based upon the failure to establish a prima facie case for the relief sought. INS v. Doherty, supra at 725; see also INS v. Abudu, supra ; INS v. Wang, supra; Yousif v. INS, 794 F.2d 236 (6th Cir. 1986); Bahramnia v. United States INS, 782 F.2d 1243 (5th Cir.), cert. denied, 479 U.S. 30 (1986); Matter of Ruiz, Interim Decision 3116 (BIA 1989); Matter of Egbunine, 19

I&N Dec. 478 (BIA 1987); Matter of Tuakoi, 19 I&N Dec. 341 (BIA 1985); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982); Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981, aff'd, Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982). Secondly, the Board must deny a motion to reopen in the absence of previously unavailable, material evidence. See 8 C.F.R. § 3.2. Thirdly, where the ultimate relief is discretionary, the Board may conclude that we would not grant the relief in the exercise of discretion; therefore, a moving party must show that he warrants the relief sought as a matter of discretion. INS v. Doherty, supra, at 725; Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (BIA 1983; A.G. 1984); Matter of Martinez-Romero, supra; Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979); see also INS v. Rios-Pineda, supra, at 449; Matter of Tuakoi, supra; Matter of Reyes, supra.

We find that after a review of the record that the motion should be denied under the third independent ground mentioned above, namely under our exercise of discretion.[3/] The respondent was found deportable and not eligible for any relief from deportation by the immigration judge on May 12, 1986. The respondent only managed to accrue 7 years of lawful unrelinquished domicile subsequent to admission as a lawful permanent resident on June 1, 1989, by virtue of his appeal from the immigration judge's decision. We find

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3/ Section 212(c) of the Act provides that relief may be granted "in the discretion of the Attorney General."

that his appeal lacked an arguable basis in law or fact, and was filed for an improper purpose, such as to cause unnecessary delay.

The respondent's contention in his original appeal that he should not have been forced to testify on the deportation issue had no merit because he only testified to his name and a conviction which occurred in 1984. The respondent's allegation that he was eligible for section 212(c) relief had been decided against him outside of the Second Circuit Court of Appeals. See Gonzales v. INS, 921 F2d 236, 238 (9th Cir. 1990); Matter of Lok, 18 I&N Dec. 101 (BIA 1981), aff'd on other grounds, 681 F.2d 107 (2d Cir. 1982) (holding that an applicant for relief under section 212(c) of the Act must be a lawful permanent resident of the United States and must have a lawful unrelinquished domicile of 7 consecutive years). It follows that if deportability and the question of relief from deportation were settled issues, then the issue of change of venue was rendered moot.

In INS v. Rios-Pineda, supra, at 450, the Court stated that no substance was found in any of the points raised on appeal, in and of themselves, and thus they were without merit. The Court went on to state that the purpose of an appeal is to correct legal errors which occurred at the initial determination of deportablity and not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites. Id. We find the same situation in the resent case. The

respondent's original appeal had no points of merit. The only apparent purpose was to delay a final administrative order of deportation until after 7 years of lawful unrelinquished domicile subsequent to lawful permanent residence had been obtained. Although the respondent requested, through former counsel, an additional 60 days to file a brief on appeal, no brief was ever submitted to supplement the bare allegations in the Notice of Appeal (Form I-290A). Accordingly, we conclude that the respondent has failed to show that he warrants the relief sought as a matter of discretion INS v. Doherty, supra at 725.

For the reasons discussed above, we deny the respondent's motion to reconsider our decision of August 28, 1991, dismissing the appeal and declining to remand the case.

ORDER: The motion to reopen is denied.4/

FOR THE BOARD

4/ Because we have denied the motion to reopen and/or reconsider, the respondent's request for a stay of deportation has been rendered moot.

Supreme Court, U.S.
FILED
JUL 22 1994
OFFICE OF THE CLERK

No. 93-1872

In the Supreme Court of the United States

OCTOBER TERM, 1994

ANTONIO CAMACHO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the time an alien spends in the United States in a nonimmigrant status can count toward the "seven consecutive years" of "lawful unrelinquished domicile" required to establish eligibility for discretionary relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is unpublished, but the decision is noted at 15 F.3d 1083 (Table). The decisions of the Board of Immigration Appeals (A.R. 409-411; Pet. App. B2-B8) are unreported.[1]

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[1] The appendix to the petition includes the decision of the Board of Immigration Appeals denying petitioner's motion to reopen (which does not primarily relate to the question he presents for review), but it does not include the Board's earlier decision dismissing petitioner's appeal, which does address the issue that petitioner seeks to bring before this Court. Our citations to the Board's decision dismissing petitioner's appeal will accordingly be to the certified administrative record (A.R.) filed with the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1994. The petition for a writ of certiorari was filed on May 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Philippines who entered the United States in July 1970 as a nonimmigrant exchange visitor under 8 U.S.C. 1101(a)(15)(J) (1970), which covered, *inter alia*, "an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide * * * trainee * * * [or] specialist * * * who is coming temporarily to the United States * * * for the purpose of * * * receiving training."[2] A.R. 40. In June of 1982, petitioner became a lawful permanent resident alien. *Ibid.* In September 1984, he was convicted in an Illinois state court of narcotics racketeering and unlawful delivery of a controlled substance (deladin). See Pet. App. B2; A.R. 483, 486.

2. In November 1984, the Immigration and Naturalization Service (INS) charged petitioner with being deportable from the United States under 8 U.S.C.

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[2] INS records indicate that petitioner entered the United States as a medical resident in pathology. In November 1976, petitioner's status was adjusted to another nonimmigrant status under 8 U.S.C. 1101(a)(15)(H)(i) (1976). At all times relevant to petitioner's case, the latter statute required that petitioner have a residence in a foreign country, which he had no intention of abandoning, and that he be temporarily in the United States to perform the services provided for by his status. The statute was later amended substantially by Section 205(c)(1) and (e) of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, §§ 205(c)(1) and (e), 104 Stat. 5020, 5022.

1251(a)(11) (1982), as an alien convicted of violating a law "relating to the illicit possession of or traffic in narcotic drugs."[3] Petitioner's initial deportation hearing took place in February, 1985. A.R. 436-438. After several continuances, petitioner, at a hearing held on May 12, 1986 (approximately four years after petitioner became a lawful permanent resident), was found deportable as charged. He then requested relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven consecutive years."[4] A.R. 465-466. Although petitioner had not been a lawful permanent resident for seven years, he contended that he could satisfy the seven-year requirement by relying on his residency in this country before he became a permanent resident. A.R. 466. The immigration judge, relying on *In re Anwo*, 16 I. & N. Dec. 293 (B.I.A. 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d

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[3] This provision was renumbered by IMMACT, § 602, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. IV 1992). The amendment does not apply to deportation proceedings, such as petitioner's, that were commenced before March 1, 1991. See IMMACT § 602(d), 104 Stat. 5082.

[4] Although 8 U.S.C. 1182(c) on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (B.I.A. 1976); see also 16 I. & N. Dec. at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

435 (D.C. Cir. 1979), rejected that contention and found that petitioner had failed to meet the seven-year requirement. A.R. 430.

3. In a decision dated August 28, 1991, the Board of Immigration Appeals dismissed petitioner's appeal. A.R. 409-411. The Board adverted to the Second Circuit's decision in *Tim Lok* v. *INS*, 548 F.2d 37 (1977), which held that an alien may possess a "lawful domicile" in the United States under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) without having been admitted for permanent residence. A.R. 410-411. The Board noted, however, that it had declined in *In re Anwo* to apply the *Tim Lok* decision in cases arising outside the Second Circuit. A.R. 411. Because petitioner's case then arose in the Seventh Circuit,[5] the Board held that *In re Anwo* was controlling. *Ibid.* Relying on its precedent and on *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979), the Board accordingly held that an alien's acquisition of seven years' lawful unrelinquished domicile under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) starts "with the date of admission for permanent residence and not before." A.R. 410. The Board further noted that on June 1, 1989, petitioner had accrued the requisite seven years prescribed in 8 U.S.C. 1182(c) (1988 & Supp IV 1992). The Board declined, however, to remand the case to the immigration judge to allow petitioner to apply for relief under Section 1182(c). A.R. 411. The Board pointed out that such reopening may not be had as of right upon a bare showing of statutory eligibility; rather, petitioner was required to show as well that he merited relief in the

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[5] By the time the Board ruled on petitioner's appeal, petitioner had moved from Illinois to California. For that reason, his appeal from the Board's decision was ultimately heard by the Ninth Circuit. See Pet. App. A20-A22.

exercise of discretion. Here, the Board noted, petitioner had been convicted of a controlled substances violation, which generally requires a showing of outstanding equities before relief will be granted; yet petitioner had not filed a motion to remand to attempt to show outstanding equities that might indicate he is worthy of a favorable exercise of discretion under Section 1182(c). A.R. 411.

4. In November 1991, petitioner filed a motion with the Board to reopen and remand, seeking 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) relief. A.R. 114-143. Petitioner thereafter filed an amended motion to reopen and reconsider. A.R. 62-107. Relying on *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985), the Board denied the motion. The Board determined that petitioner's original appeal was baseless, and that its only apparent purpose was to delay the final deportation order so petitioner could acquire the requisite seven years of lawful unrelinquished domicile in order to satisfy his statutory eligibility for discretionary relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992). A.R. 2-6 (Pet. App. B1-B8).

5. The court of appeals denied a petition for review. Pet. App. A1-A23. The court noted that with the exception of the Second Circuit's *Tim Lok* decision, all courts of appeals that have considered the issue have agreed that the seven-year period of "lawful unrelinquished domicile" under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) cannot begin until the alien becomes a lawful permanent resident. Pet. App. A12-A13. The court concluded that in light of the long history of Board precedent and the general consensus of reviewing courts, including its own decision in *Castillo-Felix*, the Board had acted properly in rejecting petitioner's reliance on *Tim Lok*. Pet. App. A14.

With respect to the Board's denial of petitioner's motion to reopen, the court concluded that it was not unreasonable for the Board to conclude that petitioner had pursued his "decade-long litigation" for the purpose of meeting the seven-year requirement under the statute. Pet. App. A22-A23. The court explained that petitioner's tactic was properly condemned by the Board, since "[t]he purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying the legal prerequisites." Pet. App. A16, quoting *INS* v. *Rios-Pineda*, 471 U.S. at 450.

ARGUMENT

Petitioner renews his contention that the seven-year period prescribed by 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) may commence before the alien becomes a lawful permanent resident of the United States.[6] The court of appeals correctly rejected that claim. Although the Second Circuit has rejected the Board's methodology for calculating the seven-year period under Section 1182(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the decisions of any

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[6] While petitioner's appendix reproduces the Board's order denying his motion to reopen (Pet. App. B1-B8), neither the question presented nor the body of the petition appears to challenge the Board's and the court of appeals' conclusion that the motion was properly denied as a matter of discretion, in accordance with *Rios-Pineda*. Thus, the only question before the Court relates to petitioner's contention that the seven-year requirement may be satisfied by periods of residency that occur before an alien acquires permanent resident status. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam).

other court of appeals. Accordingly, review is not warranted in this case.

1. The language of the statute, considered in light of the context in which the statute was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. The statute provides only that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c) (1988 & Supp. IV 1992). In our view, it is logical to assume that the reference to the unrelinquished domicile as "lawful"—following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—is intended to tie the circumstances in which an alien can establish the requisite type of domicile to the alien's immigration status. As a result, the alien can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence"; any domicile established when an alien is not "lawfully admitted for permanent residence" cannot be "lawful."

That reading of Section 1182(c) gains support from the circumstances of its enactment. The provision—enacted as part of the Immigration and Nationality Act of 1952 (INA), ch. 477, § 212(c), 66 Stat. 187—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an un-relinquished United States domicile of seven con-secutive years." Act of Feb. 5, 1917, ch. 29, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to aliens

"who came in the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950). To accomplish this purpose, Congress revised the 1917 statute in two ways: (1) by adding the initial clause, which limits eligibility to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domiciles that would support relief.

The Board considered the interpretation of Section 1182(c) shortly after the INA was enacted, in *In re S—*, 5 I. & N. Dec. 116 (B.I.A. 1953). In that case, the Board reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded that:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118. The Board consistently has adhered to this interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (B.I.A. 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (B.I.A. 1979); *In re Kim*, 17 I. & N. Dec. 144 (B.I.A. 1979).[7] The Board's contempor-

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[7] The Board has not, however, adhered to this interpretation in cases arising in the Second Circuit, in deference to the contrary

aneous and longstanding interpretation is entitled to strong deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961). Because that interpretation is reasonable, it should prevail, and three courts of appeals in fact have sustained the Board's position. See *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re Anwo*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 250 (4th Cir.) (following *In re S—*), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990).

2. Petitioner correctly notes (Pet. 16-17) that the Second Circuit adopted a contrary view in *Tim Lok* v. *INS*, 548 F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the Board's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 1182(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See 548 F.2d at 39-40. In a second opinion dealing with Tim Lok's case, however, the Second Circuit substantially limited the import of its decision in *Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establis[h] *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he

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interpretation adopted by the Second Circuit in *Tim Lok*. See *In re Anwo*, 16 I. & N. Dec. at 298.

could not establish a lawful domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of the Third, Fifth, Eleventh, and District of Columbia Circuits, which have recognized the differing approaches and yet—without deciding whether the Board's interpretation or the Second Circuit's should prevail—have denied petitions for review of Board orders in cases like this one on the theory that nonimmigrant visitors cannot establish a "lawful" domicile. *Graham* v. *INS*, 998 F.2d 194, 195-196 (3d Cir. 1993) (temporary worker); *Madrid-Tavarez* v. *INS*, 999 F.2d 111, 112 (5th Cir. 1993) ("[A]n alien student, by the terms of his student visa, could not lawfully possess an intent to remain in the United States; but if the student did in fact form such an intent, then he was in violation of his visa and was not here lawfully"); *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988) (student visitor); *Melian* v. *INS*, 987 F.2d 1521, 1524-1525 (11th Cir. 1993) (visitor for pleasure); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile). Because petitioner's status—first as a nonimmigrant exchange visitor and later as a nonimmigrant alien of "distinguished merit and ability"—similarly depended on his "having a residence in a foreign country which he has no intention of abandoning" and on his "coming temporarily to the United States" in the status prescribed, 8 U.S.C. 1101(a)(15)(J) (1970) and (H)(i) (1976), he also could not acquire a domicile in the United Sates without violating his immigration status. See *Elkins* v. *Moreno*, 435 U.S. 647, 665 (1978) (explaining that provisions of Section 1101(a)(15) that condition admission on "an intent not to abandon a foreign residence * * * by implication

[require] an intent not to seek domicile in the United States"). Accordingly, petitioner would not have prevailed even in the Second Circuit. Hence, this case presents no occasion for the Court to resolve the conflict on which the petition relies.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] The Court has twice recently denied certiorari petitions seeking resolution of the same conflict. See *Okpala* v. *INS*, 114 S. Ct. 1217 (1994); *McBride* v. *INS*, 112 S. Ct. 1558 (1992).